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# Charles E. Jennings and Vina B. Jennings v. Melroy Graham et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT LIBRARY  
 of the  
 STATE OF UTAH

CHARLES E. JENNINGS and  
 VINA B. JENNINGS, his wife,  
*Plaintiffs & Appellants.*

SEP 9 - 1963

Clerk. S. Court, Utah

vs.

MELROY GRAHAM, HENRY  
 WHEELER, STELLA OLD-  
 ROYD, WILFORD WHEELER,  
 DALE VANCE, ELLA VANCE,  
 and L. L. PETERSON,  
*Defendants & Respondents.*

Civil No.  
9944

BRIEF OF APPELLANTS

Appeal from a Judgment of the District Court of Sanpete County

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# IN THE SUPREME COURT of the STATE OF UTAH

---

CHARLES E. JENNINGS and  
VINA B. JENNINGS, his wife,  
*Plaintiffs & Appellants.*

vs.

MELROY GRAHAM, HENRY  
WHEELER, STELLA OLD-  
ROYD, WILFORD WHEELER,  
DALE VANCE, ELLA VANCE,  
and L. L. PETERSON,  
*Defendants & Respondents.*

Civil No.  
9944

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## BRIEF OF APPELLANTS

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This is an appeal from a judgment of the District Court of Sanpete County dismissing the plaintiffs' amended complaint which alleged unlawful use of water by the defendants and prayed for injunctive relief and damages. References to the Court file are designated (R.) and to the transcript are designated (Tr.).

## STATEMENT OF FACTS

The appellants, herein referred to as the plaintiffs, are now and for many years have been the owners of approximately 116 acres of farm land, referred to in the record as the "lower place," located in Sanpete County on a stream which is referred to in the testimony as Milburn Creek or the Sanpitch River, a tributary of the Sevier River. The water rights for the land are described in the decree in the case of Richlands Irrigation Company, a corporation, plaintiff, vs. Westview Irrigation Company, et al, defendants, Civil No. 8443, as follows:

18 West Milburn Irrigation Co.,  
a Mutual Ass'n for: 1870 1-60/80 Irrigation  
Otis L. Stewart  
Cyrus Stewart  
Myron Stewart  
Soren M. Nielson  
Phelinda Mower  
Ray Stewart  
J. W. Christensen  
Nellie Graham  
Tim Graham  
(Undivided one-seventh interest)

This decree, commonly known as the Cox Decree, also contains a description of the water rights of the defendants who are farmers, who own land upstream from the plaintiffs' farm, and who divert water from the South Fork of the Sanpitch River and from another tributary which is claimed by the plaintiffs to be the North Fork and is claimed by the defendants, and found

by the trial court to be an unnamed spring area, the water of which is not directly "discharged into the Sanpitch River." The maps indicate that the stream formed by such springs is in the Sanpitch River drainage in close proximity to the Sanpitch River, and except for man-made obstructions would discharge into the Sanpitch River. See Exhibits 1 and 2.

The description of the water rights owned by the defendants as stockholders in the Milburn Irrigation Company, a mutual irrigation company, is as follows:

#### 19 Milburn Irrigation Co. 1876 8-70/80 Irrigation

It is apparent from an examination of the provisions of the decree set out above, that the plaintiffs' water right has the earlier priority. The plaintiff, Charles E. Jennings, testified at length and in detail that during the years 1959, 1960 and 1961 the defendants diverted and used water under the later Milburn Irrigation Company right, when it should have been permitted to go downstream to the Long Ditch where the plaintiffs diverted water. Mr. Jennings was subjected to a long and intensive cross-examination, much of it after ordinary court hours, and his statements as to water flows and water use were not entirely consistent. (Tr. 335-340). The plaintiffs thereupon called as an adverse witness the defendant Melroy Graham, who during two of the years in question was the water master for the Milburn Irrigation Company. His testimony, which is not contradicted, and the recorded water measurements, which are not contested, are reviewed

at length in this brief under the "Argument". This evidence shows conclusively that the defendants disregarded the relative priorities of the plaintiffs' and the defendants' water right as set out in the Cox decree, and unlawfully diverted and used water to which the plaintiffs were entitled.

In taking this appeal the plaintiffs rely only upon the testimony of the witness Graham and uncontested records of measurements to prove water was physically available in the stream at times when the plaintiffs had no water or had such a small supply that it was not usable. The testimony as to the shortage of water at the plaintiffs' headgate is not denied.

Among other defenses which the court sustained in its findings is a pleading in paragraph 7 of the answer to the amended complaint to the effect that an action was commenced by W. M. Jensen and others against the Milburn Irrigation Company, No. 4443, claiming irregularity in the method of distributing the waters of the South Fork of the Sanpitch River and that in the action the plaintiff Charles E. Jennings, on behalf of the plaintiffs, entered into a written stipulation compromising and settling the differences of the parties in connection with the waters of such source. It is then alleged that this agreement was incorporated into a decree and that the waters of the South Fork had ever since been distributed to the stockholders of the Milburn Irrigation Company in accordance with its terms and provisions. The substance of the allegations respect-



ing this contention is contained in finding of fact No. 12. (R. 36). We think this decree had no bearing whatever on the issues of the present case.

The plaintiffs prayed not only for injunctive relief to enforce the Cox Decree, but also for the appointment of a water commissioner to distribute the water in controversy. In connection with this point, we wish to point out that the defendants' lands are located upstream from the plaintiffs' land, which is irrigated under the West Milburn right, and that most of the defendants are related by blood or marriage. (Tr. 360).

The trial court made findings and entered a judgment denying all claims for relief including the prayer for appointment of a water commissioner. The plaintiffs filed a motion to amend the findings of fact by adding to the end of paragraph 4 the following:

“The said water right of the plaintiffs is prior to the rights of the defendants or any of them.”

The plaintiffs also sought a finding of the Court that the small springs and seepage area described in paragraph 6 of the findings are tributary to the Sanpitch River. The third point raised by the motion was that paragraph 12 relating to the stipulation in the case of Jensen v. Milburn Irrigation Company should be stricken for the reason that it has no bearing on any issue in the case. (R. 40).

The plaintiffs also filed a motion for a new trial. Both motions were denied.



## STATEMENT OF POINTS

1. Refusal of the court to determine and enforce the plaintiffs' prior right and to make findings of fact on other critical points at issue was error.

2. The court erred in making finding of fact No. 12 which relates to a decree in another case, and is not relevant to any issue in this case.

3. The court should have either appointed a water commissioner, or directed the State Engineer to distribute the water in controversy.

## ARGUMENT

### THE REFUSAL OF THE COURT TO DETERMINE AND ENFORCE PRIORITIES WAS ERROR.

In any contest over water between claimants of water rights in the same source of supply, the logical and proper approach for the trial court to take is to determine (1) the relative priorities of the rights of the claimants, (2) whether there was water physically present in the source to supply the rights, (3) whether the water physically present could be legally used to supply the prior right and (4) if so, what steps should be taken for orderly distribution of the water in accordance with priorities.

This case involved a controversy between one of the owners of the downstream West Milburn Irrigation Company right on the one hand and the various defend-

ants who own land upstream and divert from the South Fork of the Sanpitch River and from other tributaries, on the other hand. See the Map Ex. 1, which shows the plaintiffs' point of diversion at a point designated "West Milburn Irrigation Co.", and the defendants' points of diversion at points marked 1, 2, 3, 4 on the "North Sanpitch Fork" and designated 3 and 3a on the "South Sanpitch Fork."

The court made a finding No. 4 (R. 34) that the plaintiffs owned "an undivided one-seventh interest in the West Milburn Irrigation Company right identified and described in the decree in the case of Richlands Irrigation Company, a corporation, plaintiff, vs. Westview Irrigation Company, a corporation, and others, defendants . . .". The decree in printed form is evidence. Plaintiffs' Exhibit 18. The attention of the court is directed to page 107, water right 18 as follows:

"West Milburn Irrigation Co.,  
a Mutual Ass'n. for:      1870      - 1-60/80  
Irrigation"

On page 108 of the Exhibit we find:

"Milburn Irrigation Co.      1876      - 8-70/80  
Irrigation"

The defendants are stockholders in the Milburn Irrigation Co. and claim the right to divert and use the water of the Sanpitch River only under the Milburn Irrigation Co. right. It is therefore apparent that the plaintiffs' right had a priority of 1870 and the defend-

ants' water rights had a priority of 1876. Therefore under the elementary rule of water rights of "first in time, first in right", the plaintiffs were as a matter of law entitled to have their right filled before any water would be available for the defendants. See Section 73-3-21, Utah Code Anno., 1953, which provides:

"Priorities between appropriators. — Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agriculture purposes shall have preference over use for any other purpose except domestic use."

When the trial court failed to make a finding of fact as to the relative priorities of the plaintiffs' and defendants' rights this error was pointed out in the motion to amend findings of fact. (R. 40). The court denied the motion. Thus, the court refused to make a finding as to one of the most, if not the most essential element in the case. This was obvious error, and its importance requires reversal of the case on this ground alone.

The court made no findings of fact on the question as to whether during the years 1959, 1960 and 1961 there was water available in the source to satisfy the

rights of the parties in the order of their respective priorities. Much evidence, oral and documentary, was adduced on this point, yet the court's only finding intended to cover the matter is No. 7, which is in reality a conclusion of law. It states:

' 7. At no time during the years 1959, 1960 or 1961 was there any wrongful diversion or taking of water by the Defendants or either of them; and none of the Defendants, either jointly or severally, individually or otherwise, took any water belonging to the Plaintiffs in this case. The Plaintiffs have failed to prove by a fair preponderance of the evidence that either or any or all of the Defendants have ever taken any water that belongs to or to which the Plaintiffs have the right to the use upon the lands described in Paragraph One of the Complaint or any other lands owned by the Plaintiffs or either of them."

Let us see what the facts show on this point.

The defendant, Melroy Graham, testified that he was water master for the Milburn Irrigation Co. for three years prior to the trial. (Tr. 354). He measured water diverted to the company at the point marked "Weir" on Exhibit 1, which is on the South Fork. (Tr. 361). He kept records of water measurements which were explained and received in evidence. (Tr. 383-388, 395). These undisputed measurements show that on the following dates the junior appropriators, Milburn Irrigation Co. stockholders, were getting water from the South Fork as follows:

May 9, 1960	8-70/80	sec. feet
June 8, 1960	4.69	sec. feet
May 7, 1961	3.61	sec. feet
May 15, 1961	8-70/80	sec. feet
May 29, 1961	4.69	sec. feet
	(6 inches over weir)	
May 30, 1961	4.69	sec. feet
June 8, 1961	4.69	sec. feet

See Plaintiffs' Exhibits 13 and 14.

The testimony of Charles Jennings, which is uncontradicted on this point, shows that water available for diversion at his headgate (referred to in the record as the headgate for the Long Ditch or the West Milburn ditch) was as follows:

Q. "Did you get any water in the Long Ditch after the month of May in 1960?"

A. The way I remember it we didn't get none. No, Sir." (Tr. 30).

\* \* \*

Q. "Now referring to the year 1961 I will ask you how many, if any, water turns you had from the Long Ditch for the irrigation of your lower place in 1961?"

A. Not any. None." (Tr. 151).

Exhibits 22, 23 and 24 are the official water commissioners' annual reports for 1959, 1960 and 1961. They show (Exhibit 22) that on May 9, 1960, at the head of the West Milburn ditch (Long Ditch) there was *no water* in the Sanpitch River for the Jennings diversion, when there was 8 70/80 second feet being

diverted to the defendants as shown by the Melroy Graham records tabulated above. Mr. Graham's records show water turns for the defendants during all the summer season of 1960 to and including September 17th, when the Annual Water Commissioner's report (unnumbered page 7) shows that the flow at the Long Ditch headgate dropped to less than one second foot on July 4, and less than .38 of a second foot during the month of August and *no water* at all during the month of September. The Cox decree it will be recalled awarded 1 60/80 second feet to West Milburn with an earlier priority than any right claimed by the defendants.

In 1961 according to Mr. Graham's records on May 7, there was diverted into the Milburn Irrigation Co. system 3.61 second feet when on the same date there was only .4 of a second foot at the Long Ditch. On May 15, the Milburn system with the later priority got a full supply of 8 70/80 second feet when there was only .6 of a second foot at the Long Ditch. On May 29, the Milburn system was diverting 4.69 second feet when there was only .25 of a second foot at the Long Ditch. On June 8, the Milburn system was diverting 4.69 second feet when there was .20 of a second foot at the Long Ditch. In June and July there was never more than .3 of a second foot at the Long Ditch heading and in August and September it ranged between .15 and .25 of a second foot. These small flows are not usable. Mr. Graham's report shows regular water turns in the Milburn system through July 11. (Exhibit 13).



Cloyd Jennings, the son of Charles E. Jennings, testified that he irrigated the plaintiffs' property in 1959. (Tr. 7). In June and July, 1959, he estimated 4 to 5 second feet of water above the Milburn Irrigation Co. dam. It was a tight dam. (Tr. 14, 15). He also testified there was water on the North Fork in July and August being diverted to the Oldroyd property. A fair stream. (Tr. 17, 18). "The reason we went up the North Fork was because we knew we had very little water down at the Long Ditch." (Tr. 20). "We had only two irrigation turns. When we went to take water for a third turn there was about one-half a second foot, maybe less than that." (Tr. 24-25). The State Engineer's records, Exhibit 23, show that on June 17 the water at West Milburn ditch (Long Ditch) dropped to .80 of a second foot. After July 15, there were only 2 days when the records show .25 of a second foot and after August 19, there was *no water*.

With respect to the North Fork of the Sanpitch River, Mr. Graham testified that he diverted water from the North Fork of the Sanpitch River for irrigation of the Oldroyd property west of the Sanpitch River in each of the years 1959, 1960 and 1961 under the Swen O. Nielson right and irrigated 20 acres. (Tr. 393-394). This right has a priority of 1876 and is found on page 71 of the Cox decree, Exhibit 18. This right also had a priority later than the Jennings right.

Thus, we submit that the records of the water master, the records of the State Engineer, and the



uncontradicted testimony of Charles Jennings and Cloyd Jennings, show that at times when water was physically present in the South and North Fork to supply the plaintiffs' prior rights, such water was diverted and used by the defendants to supply rights with later priorities. The records alone prove unlawful interference with the plaintiffs' rights. The trial court erred in not making a finding as to priority and a specific finding of fact as to the water physically present *as shown by the records*, and the diversions by the defendants when the prior right was not satisfied. Damages were proved and should have been awarded upon proof of the wrongful acts of defendants.

**FINDING OF FACT NO. 12 HAS NO BEARING ON THIS CASE AND SHOULD HAVE BEEN STRICKEN.**

In paragraph 7 of their answer the defendants pleaded that a stipulated decree in the case of Jensen vs. Milburn Irrigation Co. settled the water distribution and other problems here involved. The file in the case, being No. 4443, was received in evidence as Exhibit 12. The pleadings in the case, the stipulation and the decree show conclusively that the case involved only issues between certain stockholders in the Milburn Irrigation Co. on the one hand and the corporation and other stockholders on the other hand over the distribution of the 8 70/80 second feet of water awarded by the Cox Decree to the Milburn Irrigation Co., Right No. 19 on page 108 of the printed decree. There were

no issues whatever regarding the West Milburn Irrigation Co. right, which is Right No. 18 on page 107 of the decree. The present case involves the issues as to priority and right of use between rights Nos. 18 and 19, and the Jensen case only involved issues between stockholders interested in right No. 19. The relevancy of Exhibit 12 was questioned, (Tr. 349) and indications are that despite the fact that the stipulation and decree are entirely irrelevant, they seemed to have a profound effect upon the trial court. It was error to admit the Exhibit in evidence and it was error to make finding of fact No. 12. It was reversible error to base a judgment on the stipulation and decree in the Jensen case.

### **THE REFUSAL OF THE COURT TO APPOINT A WATER COMMISSIONER OR TO OTHERWISE PROVIDE FOR THE DISTRIBUTION OF WATER WAS ERROR.**

The legislature and the courts have long recognized the importance of orderly distribution of water pursuant to the judgments of the courts and the records of the State Engineer's office. Since March 13, 1919, the following language has been in the statutes:

“Wherever in the judgment of the State Engineer or the district court, it is necessary to appoint a water commissioner, or deputy commissioner for the distribution of water from any river system or water source, such commissioner or deputy commissioner shall be appointed by

the State Engineer, after consultation with the water users . . . ”

“The State Engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this Act.” Sections 62 and 64, Chapter 67, Laws of Utah, 1919.

In 1924 with the provisions quoted above in the books for five years, the Supreme Court made the following significant statement of law and policy in the case of *United States v. Caldwell*, 64 Utah 490, 503, 231 P. 434:

“It is elementary doctrine in this state that, where there is more than one appropriator on any stream, the measurements and apportionments of the water must be under the control and direction of some disinterested person. This is usually done by a water commissioner appointed by the court, or, under the present law, it may be under the direction and control of the state engineer, who, however, is always under the supervision of the court. It is for that reason that courts usually reserve continuing jurisdiction in such cases, and the decree in this case is to that effect.”

It is clear from the foregoing that the statute does not oust the court of jurisdiction to make an order directing the State Engineer to distribute the water on the upper reaches of the Sanpitch River in accordance with the Cox decree. As indicated by the Supreme Court in the *Caldwell* case, the State Engineer will be acting

“under the supervision of the Court”. It has been the practice of district courts for many years in similar cases to direct the State Engineer to distribute water. This order has usually been based on a finding of necessity.

Both the Cox decree and the statute (Section 73-5-4) require the installation of headgates and measuring devices. This requirement should be incorporated in any decree to protect the interests of the plaintiff who is a downstream user with priorities earlier than those of the defendants.

The argument was made by the defendants to the trial court that there should be no order directing the State Engineer to distribute the water in controversy because Mr. Jennings appeared as a witness in *Tracy State Engineer v. Peterson*, 1 Utah 2d 213, 265 P 2d 393, a case in which the Supreme Court affirmed a district court decision denying the recovery of delinquent water assessments for services of a commissioner on the Sanpitch River. Since that decision the statute (Section 73-5-1) has been amended to give the State Engineer specific authority to determine “whether all or a part of a river system—shall be served by a commissioner—and if only a part is to be served, shall determine the boundaries of such part.” This amendment makes the case distinguishable. Also it should be pointed out that the record is clear that the plaintiffs were not being denied the use of water to which they were entitled under the Cox decree and there was no controversy until 1958.

The Sanpitch River below the intake of the West Milburn (Long Ditch) diversion is presently under the administration of the State Engineer. Blaine Draper, who testified in the case, is the water commissioner. He maintains daily records of the flow at the West Milburn diversion by means of a "two foot parshell flume" but has nothing to do with the upper area except to check water flows at the Tanner ditch diversion with which we are not concerned here. (Tr. 417-420). The service of a water commissioner is needed to distribute water to all water users above the West Milburn diversion for the reasons stated below.

The court denied the plaintiffs' prayer for the appointment of a water commissioner apparently because he did not believe a commissioner was necessary; or because he thought the court had "no authority or power to appoint a commissioner" (Tr. 9 hearing Feb. 25, 1963). This is harsh and unreasonable. The record measurements set out above show without contradiction that for three years during the latter part of the summer when water is most needed on the farm, the upstream users were being served when the plaintiffs' supply was scanty or non-existent. The transcript shows the obvious feelings and enmity between the plaintiffs below and the group of interrelated people at the head of the stream. There are only two avenues for relief (1) apply to the State Engineer or (2) apply to the court. For obvious practical reasons any effort to get relief through the State Engineer would probably fail because Section

73-5-1, U.C.A., 1953 as amended, contains the following provision:

“ . . . The state engineer shall consult with the water users before appointing a commissioner. The form of such consultation and notice to be given shall be determined by the state engineer as shall best suit local conditions, full expression of majority opinion being, however, provided for. If a majority of the water users, as a result of such consultation, shall agree upon some competent person or persons to be appointed as water commissioner or commissioners, the duties he or they shall perform and the compensation he or they shall receive, and shall make recommendations to the *state engineer as to such matters or or either of them the state engineer shall act in accordance with their recommendations; . . .*”  
(Emphasis added.)

In any meeting the Jennings', who stand alone, would be out-numbered, and with the feeling generated by this water dispute in the small community, the chances of getting a disinterested person to control the use of water would be slight.

In the case *Minersville Reservoir and Irrigation Co. v. Rocky Ford Irr. Co.*, 90 Utah 283, 61 P. 2d 605, the Supreme Court outlined the purposes and duties of a water commissioner as follows:

“ . . . At the time the contract was entered into, the provisions of R.S. 1933, 100-5-1, hereinabove quoted, had not become law. Such provisions were enacted in 1919. Laws Utah 1919, C. 67, Sec. 62, p. 197. The law has been amended since its original enactment but the amendments



do not bear upon the controversy in the instant case. Water commissioners, however, were not infrequently appointed by the courts in connection with water litigation prior to the time the contract in question was entered into. The primary purpose of a water commissioner is to assist the court in carrying out its decrees. His duties are to aid the courts and the state engineer in the distribution to the various water users of the quantity of water to which each is entitled. The commissioner is an arm of the court and the state engineer in enforcing and protecting the various water users in their rights. He is appointed by the state engineer upon recommendation of the interested water users. The state engineer may remove him for cause upon an application of a water user and a hearing had thereon. The same power inheres in the court under which he serves. . . . ”

Every water user is entitled to receive his share of water in an orderly way. The right to proper distribution is implicit in the law. The denial of means of enforcing a decreed water right is for all practical purposes a denial of the right. We respectfully submit that the trial court erred when it refused to appoint a water commissioner or to direct the state engineer to distribute the water between the litigants in accordance with the decree.

## CONCLUSION

The plaintiffs contend that this case should be reversed because the trial court ignored the most funda-



mental issue in the case, the relative priorities of the rights of the parties, and ignored completely the record data of substantial water diversions by the defendants when the plaintiffs, who had the earlier priority, had little or no water. In short, the court was duty bound to enforce the rights of the litigants under the Cox decree, and to see that water would, in the future, be distributed by a disinterested party as contemplated by the statute and court decisions. This the court refused to do.

This is an equity case. This court should determine the priorities of the litigants' rights, and should direct the trial court to determine the damages suffered by the plaintiffs as a result of the wrongful and unlawful use of water by the defendants. The state engineer should be directed to distribute the water in the future.

Respectfully submitted,

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